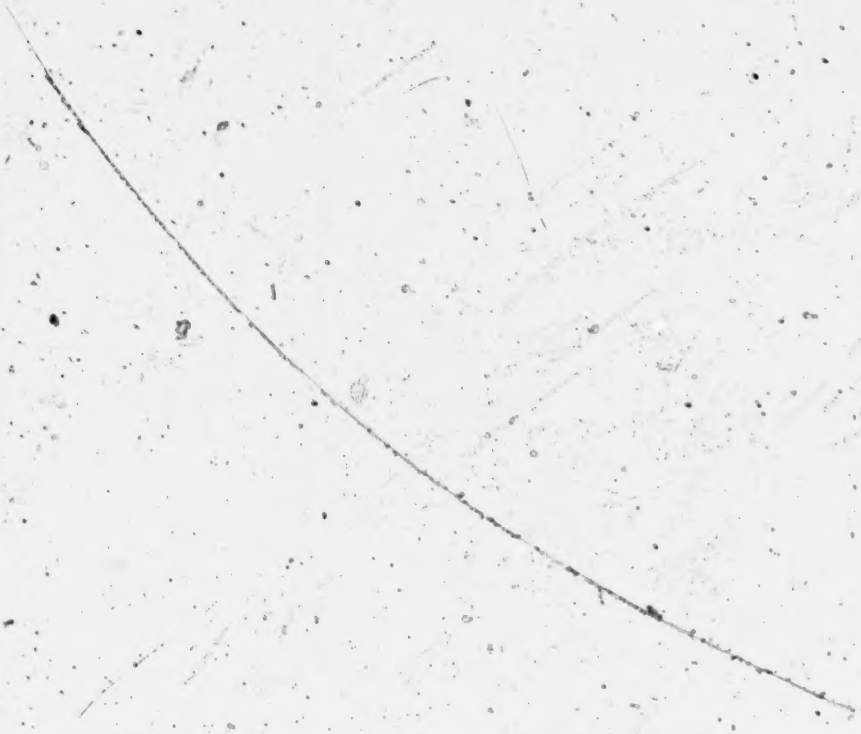

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In the

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 56

INTERSTATE CIRCUIT, INC.,
*Appellant,*

*v.*

CITY OF DALLAS,
*Appellee.*

*On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas*

## REPLY BRIEF OF APPELLANT INTERSTATE CIRCUIT, INC.

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## REPLY BRIEF OF APPELLANT INTERSTATE CIRCUIT, INC.

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### City Has Changed Its Position on Construction of Freedman v. State of Maryland

This Court's decision in *Freedman v. State of Maryland*, 380 U.S. 51 (1965) requires that a prompt final judicial review of the censor's action be assured in prior censorship cases, either by statute or authoritative judicial construction. Heretofore, the City understood, or seems to have understood, the clear meaning of the *Freedman* language

> "Therefore, the procedure must also assure a *prompt final judicial decision* * * *." (p. 59, emphasis added)

to require a decision by a Texas court of civil appeals and the Supreme Court of Texas. Now, the City contends that this language requires only that there be a prompt judicial determination in an adversary proceeding before a *trial* court. Appellee's Brief, pp. 2-11.

A brief examination of the history of Dallas City Ordinance 11284, and the attendant litigation, will reveal the reason for the City's shift in position.

Dallas has been trying desperately to have some kind of censorship. Dallas City Ordinance 10963 was passed on April 5, 1965. The local exhibitors, including the appellant herein, brought suit to have it declared unconstitutional. *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906 (N.D. Tex. 1965). The provision of that ordinance for judicial review is found in Section 7, set out on page 916 of the opinion. The court found that, "* * * there being no provision in Texas statutes for prompt judicial review in the *trial* and *appellate courts* * * *." (p. 911, emphasis added), the ordinance was unconstitutional because it did not provide for judicial review satisfying the *Freedman* requirements.

Two weeks after that decision the present ordinance was passed. R. 121-134. Section 7, relating to judicial review, was substantially expanded. The paragraphs of that section make detailed provisions for the waiving of notice, shortening of the time allowed for reply briefs, and joint filing of motions to advance in the Court of Civil Appeals and the Supreme Court of Texas.

Following the passage of this second ordinance, the local exhibitors again brought suit. *Interstate Circuit, Inc. v. City of Dallas*, 249 F. Supp. 19 (N.D. Tex. 1965).[1] The City's answer in that case provided in part:

> "This Defendant affirmatively alleges that it has been the practice of both trial and appellate courts in this State to advance the hearing or submission of a cause when requested to do so by the parties involved, particularly when one of the parties is a political subdivision such as is this Defendant, and the matter to be litigated affects the public in general resulting from the exercise of police powers, such as is involved in the case at bar, which requires a speedy determination, therefore, the ordinance in question is constitutional as applied to the Plaintiffs, because as enacted it affords the Plaintiffs prompt judicial review as a matter of law."

Record in the United States Court of Appeals for the Fifth Circuit, p. 51.

To sustain its claims regarding prompt judicial review in the trial and appellate courts in Texas, during the trial of this second ordinance, the City called Judge Dick Dixon, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, sitting at Dallas, as a witness. Record in the United States Court of Appeals for the Fifth Circuit, p. 384.

Persuaded by the arguments and testimony, the District Court found that "The appellate courts of Texas have likewise made it a policy to advance cases * * *." and that "* * * a final hearing could be obtained in the Supreme

[1] A Petition for Certiorari in this case is now pending before this Court styled *Interstate Circuit, Inc., et al. v. City of Dallas*, No. 41, October Term, 1967.

Court of Texas in less than thirty-five days." Findings IX and X, 249 F. Supp. 19, 23.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment, referring to the finding of the District Court that a final judgment could be obtained in the Texas Supreme Court in thirty-five days. *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, 600 (1966). Even so, that court's approval was conditional. The court stated, "So long as the courts are willing to cooperate in this manner (recited history of *Viva Maria* in trial court in early hearing in the Court of Civil Appeals) *Freedman's* requirements for speedy judicial action on the merits and *on review* are satisfied." (p. 601, emphasis added)

Interstate's first point for reversal is directed to the failure of Ordinance 11284 to assure a prompt final judicial decision to review the acts of the Classification Board. Interstate Brief, p. 11. Interstate contends that the delay of 247 days before a final decision of the Texas courts is obtained does not satisfy *Freedman's* requirements.

In its brief, the City does not defend the delay as being within the limits of a reasonable requirement established by *Freedman*. It does not defend the "system" which it used to secure Judge Hughes' findings that a final determination can be obtained from the Supreme Court of Texas in less than thirty-five days. It does not explain why it enacted such a detailed provision for appellate review and why it called Judge Dixon as a witness in the case before Judge Hughes. These actions are not consistent with the

interpretation which it now places upon the *Freedman* requirements.

This change in position by the City, in construing Freedman's requirements of a prompt final judicial determination to mean a judgment of a trial court instead of meaning a final judicial determination by the Supreme Court of Texas, is necessary in order for it to avoid a more difficult problem—the explanation of the eight and one-half month delay before a final judicial decision that *Viva Maria* is not suitable for young persons in Dallas.

Now that it is proven that cooperation is not obtained by the Texas Supreme Court and that there is no thirty-five day trial, candor requires that the City either confess that its ordinance does not provide a prompt final judicial determination and that it is unconstitutional, or explain (1) why it wasted words about judicial review in a long ordinance about a subject that is not relevant, (2) why it wasted the time of Judge Dixon individually and as a witness, and (3) why it has urged the courts of the United States at all levels to approve a system of appellate review for motion picture censorship which it now says is unnecessary.

The City cites two cases to support its contention that promptness is required only at the trial court level. *United States v. 56 Cartons Containing 19,500 Copies of Magazines*, 373 F. 2d 635, (4th Cir. 1967) involved the importation of *undated* nudist magazines. *United States v. One Carton Positive Motion Picture Film*, 367 F. 2d 889 (2nd Cir. 1967)

involved the importation of the motion picture "*491*". In the latter case, the importer delayed answering and asked for a recess, all of which is set out in the opinion. Although the case concerned a motion picture, the picture had not been released for public distribution and exhibition, as *Viva Maria* was when the present case arose. This court has recognized the ephemeral value of motion pictures in the *Freedman* case. 380 U.S. 51, 61 (1965).

**Ordinance 11284 Prohibits the Exhibition of Motion Pictures on Standards That Are Vague and Ambiguous**

Section 46A-1(f) of Dallas City Ordinance 11284 lists terms such as "delinquency" and "harmful effects" as standards for the Classification Board to use in determining whether a film is not suitable for young persons. These have been discussed in detail in Interstate's Brief beginning on page 21, and particularly on page 24. Words of this nature which lack a precise meaning have been held to be too vague to serve as a standard for censorship as is illustrated in the brief. Rather than to admit this point, the City addresses itself to a platitude that the parent is responsible for and should direct the training of the young mind and of the young person. Appellee's Brief, p. 18. Even if it is conceded that there is something less than obscenity which is a detriment to the community, and to the people that live in it, this does not help the ordinance provide a valid standard of censorship. Neither the standards of "not suitable for young persons" as defined in the ordinance, nor any case cited by the City, tells us what this particular

"something" is that is less than obscenity which is a detriment to the community and the people that live in it. This argument gives no precision to the words such as "harmful effects" which the ordinance directs the board to use in classifying motion pictures.[2]

The City has consistently refused to base its attempted classification upon obscenity in order to avoid coming within the scope of decisions announced by this Court defining obscenity and protecting as free speech material which is not obscene. Yet, on page 19 of its brief, as it has done on other occasions, the City uses terms which are considered to be synonyms of "obscene", i.e., "filth" and "salacious material", to describe the subject matter found in various motion pictures. Neither "filth" nor "salacious material" is found anywhere in the terms describing "not suitable for young persons" in the ordinance.

By using its own definition of "not suitable for young persons", the City avoids the restrictions of an obscenity test. It tries to justify its definition because the material is only censored for young persons. Yet, when it describes the material which is harmful for children, it uses "filth" and "salacious material", which, to the layman, are the equivalent of "obscene". Both law and common sense should require that the City either restrict its censorship to that which is obscene without using synonyms, or find constitutional support for its definition of "not suitable for young

[2] As a matter of interest, according to a report in the *Dallas Times Herald* of November 6, 1967, the board doesn't even use this vague standard. As reported: "Members say they make their judgments on the basis of 'would I want my youngster to see this movie?'."

"persons" without equating the verbiage of the ordinance to synonyms of obscenity.

Texas has a law against obscenity—Article 527, Texas Penal Code.

The City wants to censor material that is not obscene. There is no dispute about obscenity because the Appellant does not contend for the right to show obscene pictures. Its pictures are not obscene. If the City is to censor material which is "not suitable for young persons", as defined by the ordinance, then it should justify its definition without resorting to terms which are considered equivalent to obscene. Stripped of the poisoning effect of "filth" and "salacious material", the City still has the burden of sustaining its definition of "not suitable for young persons". R. 121-122. It has cited no opinions by this Court to support its definition. There are none. Its resort to synonyms of obscene should not cloud the issue. The standards of the ordinance are unconstitutional.

The City cannot make *Viva Maria* obscene by arguing that "filth" and "salacious material" are found in some motion pictures. This picture is not obscene. Its exhibition to anyone cannot be restricted, and it cannot be censored, by any test that has been approved by this Court.

The City misconstrues *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1965) when it states, on page 22 of its brief, "The Court recognized that motion pictures as and of themselves can possess a greater capacity for evil and particularly among the young people of a community, beyond that of other modes of expression."

The exact language of the Court in that case is as follows:

> "*It is further urged* that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the possible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). (emphasis added)

Another assertion overstating facts is made at the bottom of the same page where the following language is found:

> "To limit classification, as opposed to censorship, to only those films portraying obscenity beyond any redeeming social value completely ignores the detrimental and damaging effect that sexual promiscuity, abnormal sex relations, extreme brutality and criminal violence or depravity exert upon the immature mind. It can be a disease implanted in young persons. Such a disease once implanted, reflects upon the whole of society and particularly upon the individuals most closely concerned. It becomes not only a personal problem but a social problem of state and local concern."

There is no reference made to the record of this case to support these statements which the City asserts to be established facts. No citation can be given to support this series of conclusions, and there is not a scintilla of evidence in the record to support them.

The City has made an error which is common to many who prate against "obscenity". This error is recognized by

writers who have attempted to make responsible investigations into the subject of erotica and pornography.[3]

If these unsupported charges and spurious facts can be wiped from the record, it will be easy to see that the standards of the ordinance are uncertain, vague, and unconstitutional.

The City recognizes that censorship is said to come before this Court with a "heavy burden." Ordinance 11284 cannot meet the constitutional requirements imposed upon a censorship for obscenity.

There is no question that the state has the authority to regulate the admission of children to pool halls, their use of alcoholic beverages, their right to drive automobiles, to vote, and to purchase firearms. The lengthy analogies used by the City on these subjects to establish the right to regulate free speech for children is neither valid nor relevant unless the City wishes to contend that the right to enter a pool hall, or to drink alcoholic beverages, is protected by the Constitution of the United States as a basic or fundamental freedom. Similar analogies have been made before and have been rejected by this Court. *Marcus v. Search Warrants of Property, Etc.*, 367 U.S. 717, 730 (1961).

[3] See *Sex Offenders*, Gebhard, Gagnon, Pomeroy and Christenson, of the Institute of Sex Research, Inc., Harper and Rowe, 1965, p. 670 where it is stated:

> " * * * With great assurance many persons state that exposure to erotica and pornography leads to moral decay and sex offenses. The axiomatic character of these statements would lead one to the conclusion that incontrovertible scientific evidence had been adduced, either of an experimental or survey character, for their support. The present state of confusion in the courts and legislatures is ample evidence that these purported causal relationships have not been subjected to any scientific test. * * * "

**The "Balancing of Interests" Test is Inapplicable.**

The balancing test advocated by the Appellee in its brief (p. 34) was used by this Court in *Breard v. City of Alexandria, La.*, 341 U.S. 622 (1951) in upholding the validity of a city ordinance that restricted door-to-door solicitation by uninvited salesmen. It was also used in sustaining the contempt convictions of persons who refused to answer questions asked them by the House Un-American Activities Committee relating to their alleged membership and activity in the Communist Party. *Barenblatt v. United States*, 360 U.S. 109 (1959) reh. denied 361 U.S. 854; *Wilkinson v. United States*, 365 U.S. 399 (1961) reh. denied 365 U.S. 890. Other cases, mostly involving problems arising from contempt of Congress citations or Smith Act prosecutions, are cited on pages 34-37 of Appellee's Brief. However, as was stated in *American Communications Association v. Douds*, 339 U.S. 382, 397 (1950), and *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1958), the interest of the State to warrant the abridgment of First Amendment rights must be substantial or compelling. The question thus presents itself as follows: Is the interest of the State in forbidding the exhibition of certain movies, not legally obscene, to persons under sixteen (16) years of age, compelling or substantial?

Appellee has cited no facts, either within or without the record, that lend support to its contention that certain movies, not classed as obscene, are or can be harmful to a "child's welfare". There are none. The first classification

ordinance passed by the City, No. 10963, recited in its preamble that "there has been a serious increase in crime, delinquency and sexual promiscuity on the part of young persons of school age within the City * * *." *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906, 912 (N.D. 1965). As a matter of fact, there was no such increase, and the recitation was dropped from the preamble of Ordinance No. 11284. This present ordinance does recite that "certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; * * *". R. 120. There is not a shred of evidence anywhere to support this finding.

Evidence directly controverting this allegation of the ordinance was produced by the City from Captain Frank Martin, who was in charge of the Juvenile Bureau of the Police Department. He testified as follows:

> "Q. Captain Martin, is the problem concerning morals charges with juveniles decreasing or increasing in the City of Dallas?
>
> "A. I'd say it is just about stable. It is not much increase, not much decrease.
>
> "Q. It has been with us all the time?
>
> "A. It stays with us, yes, sir.
>
> "Q. You are not testifying as to what causes this, are you?
>
> "A. No. I don't know.
>
> "Q. But you are testifying that there is a problem here? (fol. 125)
>
> "A. Yes, sir."

The use of the balancing test has never been permitted in censorship cases. The general rule is that material may be censored, if obscene; if not, it cannot be. *Roth v. United States*, 354 U.S. 476 (1957); *A Book, Etc. v. Attorney General of Commonwealth of Massachusetts*, 383 U.S. 413 (1966). The rule has been slightly modified to permit censorship of material that is obscene as to certain clearly defined deviant sexual groups. *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. State of New York*, 383 U.S. 502 (1966). There is absolutely no showing that *Viva Maria*, the film in question, or any other film which the City intends to classify as "not suitable for young persons", is designed to appeal to any such clearly defined deviant sexual group, or that young persons under sixteen (16) years of age are a clearly defined deviant sexual group. The ordinance generally, and as applied to *Viva Maria*, is unconstitutional.

Based upon the foregoing, and for the reasons set out in Appellant's brief, Appellant prays that the judgments below be reversed.

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Grover Hartt, Jr.,

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## PROOF OF SERVICE

I, Grover Hartt, Jr., one of the attorneys for Interstate Circuit, Inc., Appellant herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that, on the 5th day of January, 1968, I served copies of the foregoing Reply Brief of the Appellant Interstate Circuit, Inc., on the several parties hereto, as follows:

1. On Appellee City of Dallas, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. N. Alex Bickley, City Attorney, 501 Municipal Building, Dallas, Texas, attorney of record for the City of Dallas.

2. On Intervenor United Artists Corporation, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. Paul Carrington and Mr. Dan McElroy, 1900 Mercantile Dallas Building, Dallas, Texas, attorney of record for United Artists Corporation.

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